Global Pacific Textile Industries Sdn Bhd (In receivership) v Ketua Pengarah Jabatan Kastam dan Eksais & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2-24-115-92
WAN ADNAN J
27 MAY 1994

Companies and Corporations *— Winding up — Priorities — Debenture holders — Customs duties and sales tax — Employees Provident Fund — Companies Act 1965 ss 191 & 292 — Employees Provident Fund Act 1991 s 66 — Government Proceedings Act 1956 s 10 — Sales Tax 1972 s 30*

The receivers of the plaintiffs applied for declarations relating to the priority of payments as between its creditors, ie its debenture holders; the Customs and Excise Department ('the Customs'), the first defendant, for customs duties and sales tax; and the Employees Provident Fund ('the EPF'), the third defendant, in respect of contributions payable.

Prior to the crystallization of the floating charges, the Customs had seized some of the plaintiffs' goods under s 30(1) of the Sales Tax Act 1972 and contended that as a result, the goods did not form part of the plaintiffs' assets in receivership. The Customs also contended that the plaintiffs had utilized the sales tax collected to pay the wages of its employees and, therefore, s 292(3) of the Companies Act 1965 applied to give the Customs priority over an amount of the plaintiffs' assets which was equivalent to the moneys paid to the employees.

Held, giving the EPF contributions priority over the sales tax and customs duties which ranked pari passu between them, and lastly the debenture holders:

(1) By virtue of s 10 of the Government Proceedings Act 1956, customs duties and the sales tax have priority over the claims by the debenture holders and the receivers for their costs and expenses. The EPF contributions also have priority over the debenture holders and the receivers.

(2) There was insufficient evidence to prove that the sales tax collected by the plaintiffs had been utilized to pay the wages of its employees. Therefore s 292(3) of the Companies Act 1965 did not apply to give the Customs any priority.

(3) As the goods were seized before the floating charges had crystallized, they were not subject to the floating charges. The Customs could and should be allowed to sell them to recover the sales tax under s 30 of the Sales Tax Act 1972, subject to the payments to the EPF.

(4) Since s 66 of the Employees Provident Fund Act 1991 applied, the proceeds of sale of the plaintiffs' goods which were not seized must first be applied towards payment of the EPF contributions for the 12 months preceding the date of the order for sale and, if that was insufficient, payment must be made from the proceeds of sale of the goods seized by the Customs.

(5) The costs of this application were to be paid from the plaintiffs' assets prior to the above-mentioned payments to be made.

[Bahasa Malaysia summary

Penerima bagi plaintif telah memohon untuk deklarasi berkenaan dengan keutamaan bayaran di antara pemiutangnya, iaitu pemegang debenturnya; Jabatan Kastam dan Eksais ('pihak Kastam'), defendan pertama, untuk duti kastam dan cukai jualan; dan Kumpulan Wang Simpanan Pekerja ('KWSP'), defendan ketiga, untuk caruman yang mesti dibayar.

Sebelum caj terapung itu menjadi caj tetap, pihak Kastam telah merampas barangan plaintif di bawah s 30(1) Akta Cukai Jualan 1972 dan menegaskan bahawa akibatnya, barangan itu tidak merupakan sebahagian daripada aset plaintif di dalam penerimaan. Pihak Kastam juga menegaskan bahawa plaintif telah menggunakan cukai jualan yang dikutip untuk membayar upah pekerjanya dan oleh itu, s 292(3) Akta Syarikat 1965 terpakai untuk memberi pihak Kastam keutamaan ke atas sejumlah daripada aset plaintif yang bersamaan dengan jumlah wang yang telah dibayar kepada pekerjanya.

Diputuskan, memberikan caruman KWSP keutamaan daripada cukai jualan dan duti kastam yang setaraf antara satu sama lain, dan akhirnya pemegang debentur:

(1) Mengikut s 10 Akta Prosiding Kerajaan 1956, duti kastam dan cukai jualan mempunyai keutamaan daripada tuntutan pemegang debentur dan penerima untuk kos dan perbelanjaan mereka. Caruman KWSP juga mempunyai keutamaan daripada pemegang debentur dan penerima.

(2) Tidak ada keterangan yang mencukupi untuk membuktikan bahawa cukai jualan yang dikutip oleh plaintif telah digunakan untuk membayar upah pekerjanya. Oleh itu, s 292(3) Akta Syarikat 1965 tidak terpakai untuk memberikan pihak Kastam sebarang keutamaan.

(3) Oleh kerana barangan itu telah dirampas sebelum caj terapung itu menjadi caj tetap, barangan itu tidak tertakluk kepada caj terapung itu. Pihak Kastam boleh dan seharusnya dibenarkan menjual barangan itu untuk mendapatkan balik cukai jualan di bawah s 30 Akta Cukai Jualan 1972, tertakluk kepada bayaran kepada KWSP.

(4) Oleh kerana s 66 Akta Kumpulan Wang Simpanan Pekerja 1991 terpakai, hasil jualan barangan plaintif yang tidak dirampas mesti terlebih dahulu digunakan untuk membayar caruman KWSP bagi 12 bulan yang mendahului tarikh perintah jualan itu dan, jika jumlah itu tidak mencukupi, bayaran mesti dibuat daripada hasil jualan barangan yang telah dirampas oleh pihak Kastam.

(5) Kos permohonan itu mesti dibayar daripada aset plaintif sebelum membuat bayaran yang disebut di atas.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 01–68–93.]

Notes

For cases on priorities in winding up, see 3 *Mallal's Digest* (4th Ed) paras 284–288; [1990] Mallal's Digest 130; [1992] Mallal's Digest 491.

Cases referred to

Anuarul Aini & Anor v Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru [1991] 1 MLJ 360 (folld)

Chuah Teong Hooi & Anor v Employees Provident Fund Board [1990] 2 MLJ 218 (folld)

Croshaw v Lyndhurst Ship Company [1897] 2 Ch 154 (folld)

Robson v Smith [1895] 2 Ch 118 (folld)

Rother Iron Works Ltd v Canterbury Precision Engineers Ltd [1973] 1 All ER 394; [1974] QB 1; [1973] 2 WLR 281 (folld)

Legislation referred to

Companies Act 1965 ss 191, 292
Customs Act 1967 ss 11, 14A, 65, 101
Employees Provident Fund Act 1991 ss 51, 65, 66
Government Proceedings Act 1956 s 10
Sales Tax 1972 ss 23, 30, 34, 70

Ng Sai Yeang (*Raja, Darryl & Loh*) for the plaintiffs.

Mohamed Bazain bin Idris (Legal Advisor) for the first and second defendants.

Mohd Naim Daruwish (Manager, Legal Department of the Employees Provident Fund) for the third defendant.

Wan Adnan J: In this application the plaintiffs are asking for the following declarations and orders:

(1) that a declaration be made whether on the true construction of the provisions of the Customs Act 1967, in particular ss 11 and 65 thereof, and the provisions of the Companies Act 1965, in particular ss 191 and 292 thereof, the customs duties leviable against Global Pacific Textile

Industries Sdn Bhd (in receivership) has priority of payment over the claims of the following:

(a) the Hongkong & Shanghai Banking Corp Ltd and the Pacific Bank Bhd, both the debenture holders of the said Global Pacific Textile Industries Sdn Bhd (in receivership), including the claims for the principal and interest due to them; and

(b) the receivers and managers of the said Global Pacific Textile Industries Sdn Bhd (in receivership) being costs and expenses incurred by them in the course of its receivership;

(2) that a declaration be made whether on the true construction of the provisions of the Sales Tax Act 1972, in particular ss 23 and 70 thereof, and the provisions of the Companies Act 1965, in particular ss 191 and 292 thereof, the sales taxes leviable against the Global Pacific Textile Industries Sdn Bhd (in receivership) has priority of payment over the claims of the parties as stated in paras (1)(a) and (1)(b) above;

(3) that a declaration be made whether on the true construction of the provisions of the Employees Provident Fund Act 1991, in particular ss 51 and 65 thereof, and the provisions of the Companies Act 1965, in particular ss 191 and 292 thereof, the Employees Provident Fund contributions payable by Global Pacific Textile Industries Sdn Bhd (in receivership) have priority of payment over the claims of the parties as stated in paras (1)(a) and (1)(b) above;

(4) that in the event that the court does hold that the said customs duties, sales taxes and employees provident fund contributions as stated in paras (1), (2) and (3) above do rank in priority over the preferential debts and the claims of the parties as stated in paras (1)(a) and (1)(b) above, that a declaration be made whether on the true construction of the provisions of the Companies Act 1965, the Customs Act 1967, the Sales Tax Act 1972 and the Employees Provident Fund Act 1991, which of the said custom duties, sales taxes and employees provident fund contributions leviable rank in priority and their ranking of the same vis-a-vis one another;

(5) that the court do make orders consequential to the above, including orders and directions in respect of the amount to be paid by Global Pacific Textile Industries Sdn Bhd (in receivership) to each of the defendants concerned (where applicable);

(6) that the court do make orders in respect of the costs of and incidental to this application herein and/or that the costs of and incidental to this application herein be borne and paid out of the assets of the Global Pacific Textile Industries Sdn Bhd (in receivership) prior to any payments ordered to be made to the defendants concerned (where applicable);

(7) that the plaintiffs do have liberty to apply; and

(8) for such further or other orders and relief as this honourable court deems fit.

The plaintiffs are the receivers and managers of Global Pacific Textile Industries Sdn Bhd (in receivership) (hereinafter referred to as 'GPTI'). They were appointed on 16 March 1992 by the Hongkong & Shanghai Banking Corp Ltd and the Pacific Bank Bhd (hereinafter collectively referred

to as 'the debenture holders') pursuant to two debentures dated 1 June 1990 granted by GPTI in favour of the debenture holders.

As at 31 July 1992, the amount claimed by the defendants to be owing by GPTI are as follows:

(i) the sum of RM122,388.79 claimed by the Director General of Customs and Excise being customs duties leviable;

(ii) the sum of RM972,338.06 claimed by the Director General of Customs and Excise being sales tax leviable; and

(iii) the sum of RM835,600 claimed by the Employees Provident Fund Board being the Employees Provident Fund contributions payable.

As at 31 October 1992, the amounts due and owing by GPTI to the debenture holders, the Hongkong & Shanghai Banking Corp Ltd and the Pacific Bank Bhd are RM4,989,710.69 and RM6,291,809.03, respectively.

As at 31 July 1992, the estimated realizable assets of GPTI is in the region of RM11,248,000 which consists of the following:

(a) the sum of RM10,222,000 being the estimated sum realizable from the fixed assets of GPTI; and

(b) the sum of RM1,026,000 being the estimated sum realizable from the assets of GPTI subject to the floating charges under the debentures.

According to the first defendant, because of the failure of GPTI to pay the sales tax, the first defendant invoked his power under s 30(1) of the Sales Tax Act 1972 and seized goods belonging to GPTI. The seizures were made on 6 March 1992, 8 March 1992 and 10 March 1993 before the appointment of the plaintiffs as the receivers and managers which was on 16 March 1992. Pursuant to s 30(2) of the Sales Tax Act 1972, the first defendant issued a notice to GPTI notifying his intention to sell the goods seized. The goods have not been sold because the plaintiffs had persuaded the first defendant to postpone the sale.

It is the contention of the first defendant that the goods seized by the first defendant no longer form part of the assets of GPTI subject to the floating charges. At the time the floating charges were crystallized the goods seized were already outside the possession or right of GPTI. Thus the plaintiffs cannot claim a right over the said goods as forming part of the items in receivership.

Section 30(1) of the Sales Tax Act 1972 states as follows:

> Where —
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> (a) the whole or any part of sales tax or other moneys payable under this Act has not been paid; or
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> (b) the whole or any part of any sales tax or other moneys, after having been paid, has been erroneously refunded,
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> then, provided a demand is made within three years from the date on which such sales tax or other moneys were payable, or deficient sales tax or other moneys were paid, or the refund was made, as the case may be, the person

> liable to pay such sales tax or other moneys or the person to whom such refund has erroneously been made, as the case may be, shall pay the deficiency or repay the amount paid to him in excess, and without prejudice to any other remedy for the recovery of the amount due, any goods belonging to such person which may be in Excise or Customs control or at a place or places specified in the licence issued under section 13 may be seized until such sales tax or deficiency be paid or the refund be repaid, as the case may be.

Sub-section (3) of the said section provides as follows:

> The proceeds of the sale of any such goods shall be applied to the payment of the sales tax and other moneys or recovery of the amount due or other charges which may be due in respect of selling off such goods, and the surplus if any, shall be paid to the owner of such goods and if the owner cannot be found within one month of the sale, such surplus shall be paid to the Consolidated Fund.

It is very clear that the first defendant had the right to sell the goods seized to recover the sales tax. It is not necessary for the first defendant to resort to civil proceedings. Once seizure under sub-s (1) had been effected, the said goods ceased to be in possession of GPTI and therefore outside their control. The first defendant is entitled to utilize the proceeds of the sale of the said goods to recover the sales tax.

In *Robson v Smith* [1895] 2 Ch 118, Romer J said [at p 124]:

> Debentures like the plaintiff's have been frequently considered by the courts. They constitute what is called a 'floating security' — that is to say, they allow the company to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture holders, or, as it has been said (see *In re Standard Manufacturing Co* [1891] 1 Ch 641), they constitute a charge, but give a licence to the company to carry on its business. So long as the debentures remain a mere floating security, or, in other words, the licence to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture holders, provided that the dealing be completed before the debentures cease to be merely a floating security.

In *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1973] 1 All ER 394; [1974] QB 1; [1973] 2 WLR 281, the plaintiff company on 4 October 1971 owed the defendants £124 for goods sold and delivered. Between 4 and 18 October 1971, the plaintiff company contracted for the sale by the plaintiff company and purchase by the defendants of goods to the value of £159. On 21 October, before the contract had been carried out, the bank appointed a receiver and manager under its debenture, whereupon the floating charge crystallized. The goods ordered by the defendants were delivered to them on 3 November. The receiver claimed that the defendants were not entitled to set off the plaintiff company's debt of £124 since the defendants' debt having arisen on delivery of the goods after crystallization of the floating charge was an asset of the company

which thereby became subject to the bank's charge. It was held that the defendants were only liable to pay £35 to the receiver and being entitled to set off the £124 due to them under the earlier contract. Russell LJ held ([1973] 1 All ER 394 at p 396; [1974] QB 1 at pp 5–6; [1973] 2 WLR 281 at p 282):

> Those rights were always subject to a right in the defendants to assert that since the plaintiff company owed £124 to the defendants a payment of £35 would settle the account; and the debenture holder as equitable assignee could not be in a different or better position in that regard than the plaintiff company.

In the present case, when the goods were seized pursuant to s 30(1), GPTI was still carrying on business as the floating charges had not yet crystallized. The seizures are therefore binding on the plaintiffs as receivers and managers. It is also my opinion that the first defendant should be allowed to proceed with the sale of the goods seized. In *Croshaw v Lyndhurst Ship Company* [1897] 2 Ch 154, Stirling J said [at p 161]:

> It is now well settled that the court has a discretion as to whether it will allow proceedings which have reached a certain point to go further or no. That was laid down in *In re Great Ship Co* 4 DJ & S 63, which has been followed in many subsequent decisions. As to the exercise of this discretion the general rule which has been laid down amounts to this: that where as regards execution creditors the sheriff has at the date of the commencement of the winding-up actually seized goods belonging to the company, but has not sold them, the court will, in the absence of special circumstances, allow the execution to be proceeded with, and the goods to be sold and realized. On the other hand, if the writ has merely reached the hands of the sheriff and he has not seized, the court has held that it will not allow the proceedings to go further — again in the absence of special circumstances.

Section 191(1) of the Companies Act 1965 provides as follows:

> Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders *of any property comprised in or subject to a floating charge*, then if the company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages salary vacation leave or superannuation or provident fund payments and any amount which in a winding up is payable in pursuance of section 292(3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts. (Emphasis added.)

This section is only applicable in respect of 'any property comprised in or subject to a floating charge'. As I hold that the goods seized by the first defendant pursuant to s 30(1) of the Sales Tax 1972 are not subject to the floating charges, this section is not applicable in respect of the said goods. But this section does apply to all other goods of GPTI which are not seized by the first defendant (hereinafter referred to as 'the other goods').

As stated earlier, the first defendant is also claiming a sum of RM122,388.79 being the customs duties payable by GPTI. According to the first defendant, the customs duties were not collected at the time of import because GPTI had applied to the Minister of Finance under s 14A of the Customs Act 1967 for the import duties to be exempted. But the Minister had only granted a partial exemption. Thus the amount became due and owing.

In the case of *Anuarul Aini & Anor v Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360, the court held that sales tax is accorded priority of payment by reason of the provision of s 10 of the Government Proceedings Act 1956 which is as follows:

> (1) All debts due and claims owing from time to time by any person to the Government, whether upon judgment, bond, or other specialty, or upon simple contract or otherwise, shall be entitled from the date of the accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever.
>
> (2) Nothing herein contained shall affect any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge.

I was informed that the decision in *Anuarul Aini*'s case [1991] 1 MLJ 360 had been confirmed by the Supreme Court.

The principle is equally applicable to customs duties as customs duties are also debts due to the Government.

Thus I am of the view that the customs duties and the sales tax leviable against GPTI have priority of payment over the claims by the debenture holders and the receivers and managers for their costs and expenses.

I am also of the view that the claim for EPF contributions also have priority over claims of the debenture holders and the receivers and managers — see *Chuah Teong Hooi & Anor v Employees Provident Fund Board* [1990] 2 MLJ 218.

Now I shall consider the priority of payment between the claim by the first defendant for customs duties and sales tax and the claim by the third defendant for the Employees Provident Fund contributions payable.

The first defendant contends that the sales tax collected by GPTI and not remitted to the first defendant was utilized by GPTI to pay the wages of the employees. A director and an accountant of GPTI had admitted this fact in their statement to the first defendant recorded under s 34(1) of the Sales Tax Act and s 101(1) of the Customs Act. Therefore s 292(3) of the Companies Act 1965 applies.

Section 292(3) provides as follows:

> Where any payment has been made to any employee of the company on account of wages salary or vacation leave out of money advanced by a

> person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee would have been entitled to priority in the winding up has been diminished by reason of the payment, and shall have the same right or priority in respect of that amount as the employee would have had if the payment had not been made.

Apart from the admission there is no other evidence to prove that in fact the sales tax collected by GPTI had been utilized to pay the wages of the employees. I am not prepared to find that as a fact. At the most, it can only be said that the employees were paid their wages out of a mixed fund of GPTI. There is no evidence that the sales tax collected were kept separately from the other funds of GPTI. I therefore hold that s 292(3) has no application.

In *Chuah Teong Hooi & Anor v Employees Provident Fund Board* [1990] 2 MLJ 218, I had to consider the priority of payment between the claim by the Employees Provident Fund Board and the claim by the receivers and managers for their costs and expenses. I held that the EPF claim took priority. In that case I held [at p 220]:

> The sums deducted come under s 15(a). Section 15(b) refers to the amount which the company still owes the EPF as their contributions. These sums are not liable to be attached in respect of any claim whatsoever including the claims by the plaintiffs as receivers and managers.
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> ... Whenever there is a sum due from any employer as his contributions to the EPF, from any moneys in the hands of the company or its receivers and managers, the amount due to the EPF must be paid first.

In the present case, in respect of the other goods I hold that the claim for EPF contributions take priority over claims for customs duties and sales tax.

Section 66 of the Employees Provident Fund Act 1991 provides as follows:

> If, at any time before the date of the commencement of a winding up in the case of a company or before the making of a receiving order in the case of a debtor in bankruptcy —
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> (a) an attachment has been issued against the property of an employer in execution of a decree against him and any such property has been seized or sold or otherwise realised in pursuance of such execution; or
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> (b) the property of an employer has been sold, on the application of a secured creditor,
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> then the proceeds of the sale or other realisation of such property shall not be distributed to any person entitled thereto until the court ordering the sale or other realisation, has made provision for the payment of any amounts due in respect of contributions payable by the employer under this Act during the twelve months before the date of such order.

I find that this section applies in respect of the goods of GPTI seized by the first defendant pursuant to s 30(1) of the Sales Tax Act 1972. Under this

section the proceeds of sale of the goods must first be applied towards the payment of the EPF contributions for 12 months.

For the reasons stated above I granted the declarations No 1, 2, and 3 in the affirmative. For declaration No 4, I gave the following directions:

(1) The goods seized under s 30 of the Sales Tax Act 1972 do not come within the items forming part of the property subject to the floating charges.

(2) In respect of the other goods the EPF contributions rank in priority to the sales tax and the customs duties which between them rank equally.

(3) In respect of goods which have been seized under s 30 of the Sales Tax Act 1972 the first defendant is entitled to proceed with the sale in accordance with the provision of the said section. But since s 66 of the Employees Provident Fund Act 1991 has application, from the proceeds of sale payment must be made for the amount due in respect of EPF contributions payable by GPTI for 12 months if still outstanding after the EPF has been paid from the proceeds of sale of the other goods.

I also directed that the costs of this application be paid from the assets of GPTI prior to the payments to be made.

Order accordingly.

Reported by Anne Khoo